No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB (a corporation) and BJARNE ERIKSEN (an individual),

Appellants,

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

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Appellants,

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

This is an appeal by the defendants from an order of the District Court appointing, at the instance of the plaintiff, a receiver *pendente lite* to take possession of and operate the Norwegian steamer "Pacifico".

Statement of the Case.

The subject-matter of the action is the steamer mentioned. She is registered under the Norwegian flag and her registered owner is the defendant Eriksen, a

citizen and resident of Norway. He, however, holds the title to the vessel only as trustee for the other defendant, a Norwegian corporation, which for brevity we may term the "Norsk Hydro". In other words the two defendants are the registered owner of the vessel and the beneficial owner for whom the registered ownership is held in trust. These defendants were in possession of the vessel.

The object of the action is to establish that the plaintiff is the true beneficial owner of the vessel, and to compel the defendants to transfer her to it as such owner (Tr. pp. 19, 20), the gravamen of the alleged cause of action as set out in the plaintiff's complaint being, that prior to the acquisition of the steamer by the defendant, her registered ownership was held by one Mathiesen in trust for the plaintiff, but that in violation of this trust Mathiesen transferred her registered ownership to the defendant Eriksen, who took the same in trust for the defendant Norsk Hydro, and that such transfer was made without consideration and with notice on the part of both defendants of the plaintiff's alleged right (Tr. pp. 9-19).

The ground, and the only ground, on which the appointment of a receiver *pendente lite* was asked is that, as asserted in the petition for the appointment (Tr. pp. 23-25), the captain of the steamer had, up to July 15, 1921, or only four days before the filing of the complaint, received and followed the instructions of the plaintiff with regard to the vessel, but that since said date had refused to follow such instructions and had followed those of the defendant Norsk Hydro; that as a

result it was impossible for the plaintiff to operate the vessel; that the defendant Norsk Hydro intended to operate her and would, as an incident of such operation, send her to sea and consequently beyond the jurisdiction of the court; that the vessel should be operated to prevent serious loss through depreciation and loss of earnings, and that to protect the rights and interests of those entitled to operate the vessel it was necessary that the court appoint a receiver to take charge of and operate her. In other words, the case for the appointment of a receiver, as stated by the moving papers, was based essentially upon the fact that the plaintiff had been in possession of the vessel, through her captain, up to four days before the commencement of the action, when the plaintiff was dispossessed, so to speak, by the action of the captain in refusing to take further orders from it and taking orders from the defendants.

In this connection it is to be noted that while it is alleged that the defendants, unless prevented, would operate the vessel and as an incident of her operation would send her to sea and consequently beyond the jurisdiction of the court (Tr. p. 24), there is no allegation that the defendants had any intention of failing to comply with any judgment that might be rendered against them, or were intending to send the vessel to sea for the purpose of defeating such a judgment, or for any purpose other than that of operating her so that she might be profitably employed. Nor is it alleged that the defendants are not financially able to answer to the plaintiff for the full value of the vessel and for any earnings they might receive from her op-

eration, or that for any reason a judgment against them would be ineffective or incapable of enforcement whether the vessel were within the territorial limits of the court's jurisdiction or not. For example, while it appears that the defendants are both citizens of Norway, it is not alleged nor is there any showing either that a judgment here would not be recognized or enforced in Norway, or that the defendants have not within the jurisdiction of the court property sufficient to satisfy any judgment against them. It is also to be noted that the action is a purely personal one against the defendants and is not an action *in rem* against the vessel, and that the defendants have appeared and submitted to the jurisdiction of the court, so that the sending of the vessel to sea and her consequent removal from within the territorial limits of the court's jurisdiction would not affect that jurisdiction in the slightest. It is also to be noted that a receiver is not asked for on the ground of any danger to the vessel involved in her being allowed to remain in the possession of the defendants. To be sure the defendants would send her to sea as an incident of her operation, and she would then be exposed to loss through the perils of the sea, but the very function of the receiver and the purpose of his appointment is to operate the vessel and send her to sea and thereby expose her to the very same perils to which she would be exposed if sent to sea by the defendants. So far as danger of loss is concerned, the situation is the same whether it be the defendants or a receiver who operate the vessel.

Summing the matter up, then, the ground on which the appointment of a receiver was asked is not that there was any danger, either that the court would lose jurisdiction, or that its judgment, if it finally gave one against the defendants, would be rendered ineffective or unenforceable, or that there was any danger of the vessel's being lost because of the defendants' operating her which would not exist if she were operated by a receiver, but is, as we have stated, that the plaintiff was in the possession of the vessel up to just before the commencement of the action and was then wrongfully deprived of it, and that under these circumstances the defendants should not be permitted to have the possession and operation of the vessel during the pendency of the litigation, but a receiver should be appointed to have possession of and operate her.

The application for the appointment was heard upon the moving papers, to-wit: the complaint and petition, upon the defendants' answer and certain affidavits on their behalf, upon certain affidavits on behalf of the plaintiff in rebuttal and upon evidence introduced on behalf of the defendants.

The affidavits for the defendants took direct issue with the essential ground upon which the appointment of a receiver was asked for, namely, that the plaintiff had been in possession of the vessel, through her captain, up to four days before the commencement of the action, and had then been wrongfully dispossessed. The discussion of the showing made upon this point more properly comes within the argumentative portion of this brief and will be reserved for it. Suffice it to say

here that, as we believe, it was conclusively shown that the alleged ground did not exist and that the averments of the plaintiff's petition in that respect were untrue. That the ground, and the only ground, upon which a receiver was asked for was conclusively shown to be untrue, is the first reason why we claim the order appointing a receiver to have been erroneous.

The second reason why we claim the order to have been erroneous proceeds upon the well-established rule that the possession of a defendant having the legal title to the subject-matter of the litigation will not be disturbed *pendente lite* by the appointment of a receiver except for the very strongest of reasons, and, in particular, that such a defendant will not be so dispossessed prior to a final determination that his possession is wrongful, unless it clearly appear that the plaintiff will probably prevail in the litigation. Our claim in this case is that it did not appear that the paintiff would probably prevail, but quite the contrary; that in fact as to at least three of the defenses pleaded the facts were not controverted, and the only possible question is one of law as to whether or not they constitute valid defenses. With this explanation, we proceed to state the defenses pleaded.

The defenses were four in number. The first is a denial that the registered ownership formerly held by Mathiesen was held by him in trust for the plaintiff. If, however, this had been the only issue in the case, the facts appearing in the pleadings and affidavits on both sides are such that we would not be justified in saying positively that the lower court might not reason-

ably conclude that there was a fair probability of the plaintiff establishing that such a trust existed as to Mathiesen in favor of the plaintiff. This defense, therefore, may be dropped from consideration on this appeal.

The second defense is that the defendants did not purchase the vessel and acquire her registered ownership without a valuable consideration and with notice or knowledge of any claim or right on the part of the plaintiff, but quite the contrary; that the real fact is that the defendants were bona fide purchasers for value and without notice, so that they took free of any trust in favor of the plaintiff, if such trust existed. The only evidence, if it may be called evidence at all, that the defendants did not acquire their interest for a valuable consideration and without notice or knowledge of any claim by the plaintiff, is the bare averments of the complaint to that effect. These averments are made upon information and belief only (Tr. pp. 13-16). They are denied under oath, positively and directly (Tr. pp. 29, 30). The plaintiff's affidavits in rebuttal do not support the averments of the complaint. In other words, the situation is that the only averments that the defendants acquired their legal title without a valuable consideration and with notice are made upon information and belief only, and are positively and directly denied. Nor does the plaintiff's proof anywhere set forth any matters showing, or tending to show, either that the transfer of the vessel to the defendants was without a valuable consideration or that it was made with notice or knowledge on their part of the plaintiff's claim. There are facts alleged in the plaintiff's rebuttal

affidavits showing, or tending to show, that one C. Henry Smith, whom the defendants supposed to be the beneficial owner, was acting for the plaintiff, and that Mathiesen, the original holder of the registered title, knew or should have known this fact, and also that one Barth, the attorney in Norway of Smith, knew of the plaintiff's interest; but that the defendants knew of it, or should have known of it, is not anywhere averred except upon information and belief, nor are any facts alleged showing, or tending to show, that the defendants knew, or should have known, of the plaintiff's right, assuming that it had a right. The only possible ground on which it can be contended that anything appears to rebut the positive denials of the defendants that they took with notice, is that it appears, in fact the defendants freely admit, that they purchased the vessel knowing that her registered owner, Mathiesen, held his title in trust, but believing that he held it in trust for the C. Henry Smith mentioned, with whom they were dealing. It may be contended that because the defendants knew that Mathiesen held the registered title in trust, they were put upon inquiry as to whom he held it in trust for, and had to ascertain, at their peril, who was the true beneficiary. This, in fact, as we remember it, was the only response in the lower court by plaintiff's counsel to the contention that because the only averments that the defendants took with notice were upon information and belief, and were positively and directly denied, and the exact contrary affirmed, it had to be taken that the averments were untrue. This contention that one purchasing from a trustee must ascer-

tain at his peril the true beneficiary for whom the trustee holds, presents a pure question of law, and its discussion will be reserved for the argumentative portion of this brief. It is, we believe, the only real question in connection with this defense.

While it is true, as we believe, that the only question in connection with this defense is the question of law just stated, yet it is worthy of note that the defendants set out in detail the circumstances under which the vessel was acquired by them (Tr. pp. 33-37), that their averments in this respect are not controverted and must be taken to be true, and that these circumstances show beyond question that the defendants advanced a valuable consideration for the vessel, and also indicate pretty plainly that the defendants must have done so without any suspicion that anyone except Smith had any claim or right to the vessel. The circumstances of the purchase are such that it is hardly possible that the defendants would have taken the vessel if they had suspected for a moment that any one other than Smith had any interest in her.

The circumstances relative to the purchase of the vessel by the defendants, as detailed by them, are briefly as follows (Tr. pp. 33-37):

In January, 1921, the C. Henry Smith mentioned was indebted to the defendant Norsk Hydro upon an open account in the amount of approximately $150,000 for nitrates sold him by the Norsk Hydro, or sold by him for it upon a *del credere* commission. It had been the custom between the Norsk Hydro and Smith for the

former to deliver nitrates to the latter without requiring payment for them in advance, but by reason of the large amount owing to it, the Norsk Hydro refused in that month to deliver any more nitrates to Smith without payment therefor on delivery unless his debt to it was paid or adequately secured, and, in particular, refused to deliver to Smith the shipping documents for a consignment of nitrates whose immediate arrival in California was expected. Smith thereupon offered the steamship "Pacifico" as security for his indebtedness, provided the Norsk Hydro would continue to deliver him nitrates without requiring payment in advance. The Norsk Hydro accepted the offer, believing that Smith was the real owner of the vessel, and Smith thereupon caused her registered owner, Mathiesen, to deliver the bill of sale for the vessel to Eriksen, the nominee of the Norsk Hydro, and by virtue of this bill of sale the registered ownership was later transferred to Eriksen. The Norsk Hydro, on its part, on delivery of the bill of sale, caused the delivery to Smith of the shipping documents for the consignment of nitrates mentioned, without payment therefor in advance, thereby increasing the indebtedness of Smith to it by the amount of the price of the nitrates, approximately $90,000 (Tr. pp. 33-37). In other words, the uncontroverted facts are, in brief, that in consideration of an antecedent indebtedness of $150,000 due it, and the delivery by it of nitrates whereby an additional indebtedness to it of $90,000 was incurred, the Norsk Hydro took from the registered owner of the vessel, at the instance of Smith, whom it believed to be the beneficial owner, a bill of

sale for the vessel and had her registered ownership transferred to Eriksen, to be held as security for the total indebtedness of Smith of $240,000. That there was here a valuable consideration is beyond question, and we will not argue the point. We think it likewise evident that the Norsk Hydro would hardly have engaged in and consummated this transaction if any suspicion whatever had occurred to it that Smith was not the real owner of the vessel.

The third defense is that, even assuming that the defendants are not protected as bona fide holders of the legal title of the vessel for value, and without notice, and stand simply in the shoes of Smith, yet the plaintiff could not recover the vessel from Smith and cannot recover it now from the defendants, who at least stand in his shoes, without first paying, or offering to pay, the sum of $290,000, which Smith paid from his own personal funds on the price of the vessel upon the original purchase of her, the very purchase under which the plaintiff claims, and which it claims was made by Smith for it. This defense proceeds upon the legal proposition that a person who has himself contributed the funds, or a part of the funds, whereby certain property was acquired, is entitled to be reimbursed by one who claims that the property was in fact purchased for him before the latter can take the property from the one who made the purchase and advanced his own money for that purpose. The particular facts in this connection are averred in the answer upon information and belief, as they were not within the personal knowledge of the defendants, but the averments of the answer are

fully supported by the positive allegations in the affidavit of C. Henry Smith (Tr. pp. 50-53). The allegations in the affidavit are not controverted, and it is to be noted that they are as to matters necessarily within the knowledge of the plaintiff and easily capable of being disproven if untrue. The matters alleged are these:

The steamer was originally a Japanese vessel and was purchased from her Japanese owners for approximately $350,000 by Smith, who caused her to be transferred to the Norwegian flag and to be registered in the name of Mathiesen as her owner. The plaintiff claims that this purchase was made by Smith for it. Smith declares (Tr. p. 51) that the purchase was in fact made for an association of himself and other individuals who proposed to organize themselves into a Norwegian corporation, and that the plaintiff was used merely as a temporary organization to represent their association and was not to have any real interest in the vessel. But, whatever the fact may be as to the plaintiff having or not having any real interest in the purchase, the uncontroverted facts are that Smith paid from his own funds the full purchase price of the vessel, approximately $350,000, that certain individuals who had agreed to associate themselves with him in the venture of buying the steamer had agreed to contribute toward her price a total of $60,000, and after her purchase did contribute this amount through the plaintiff, and that with the exception of this amount Smith has never been reimbursed for any portion of the purchase price and there has been no offer to reimburse him for

it. In other words, even assuming that the purchase was made by Smith for the plaintiff, and that the $60,000 contributed may be considered as paid by the plaintiff, the situation is that the plaintiff paid but $60,000 on account of the purchase price, and that Smith paid the balance, or $290,000, for which he has not been reimbursed, and which is necessarily due him from the plaintiff if the purchase is to be considered as having been made for the latter's account.

It is also to be noted that the uncontroverted fact is that it was agreed at the time of the purchase that a portion of the purchase price might be raised by a mortgage on the vessel (Tr. pp. 51, 52), which was not done, so that Smith stands in the position of one who, authorized to mortgage the vessel in order to raise a portion of the purchase price, himself advances the money instead of raising it by mortgage. It is also to be noted in explanation of Smith's conduct in virtually pledging the vessel to the defendants for his own indebtedness to the Norsk Hydro, that the amount for which he so pledged her was less than the amount which he himself had in the vessel, so to speak, such amounts being $240,000 and $290,000, respectively.

As we have said, the foregoing facts are not controverted. The result is that the only question presented by this defense is one of law, viz: do the facts alleged constitute a valid defense? The discussion of that question is reserved for the argumentative portion of the brief.

The fourth defense (Tr. pp. 40-41) is that at the time of the original purchase of the steamer and her

registry under the Norwegian flag, a registry obtained in accordance with the understanding upon which she was purchased (Tr. pp. 58-59), it was, and ever since has been, illegal under the Norwegian law for either the legal or the beneficial ownership of a Norwegian vessel to be held by one, such as the plaintiff, who is not either a citizen of Norway or a Norwegian corporation, and also that it is illegal under the Norwegian law for the legal or beneficial ownership of a Norwegian vessel to be transferred to one who is not a Norwegian citizen, and that the ultimate relief sought in this case —the transfer of the vessel to the plaintiff and the recognition of it as her beneficial owner—cannot legally be made by the laws of Norway, to which the vessel is subject, and cannot be made without subjecting the vessel itself to forfeiture under the Norwegian laws, and the defendants to liability to fine and imprisonment.

The positive averments of the answer as to the Norwegian law are not controverted, save that G. W. Bell, one of the attorneys for the plaintiff, states in his affidavit that he has searched and has been unable to find any Norwegian law prohibiting or penalizing the transfer of a Norwegian vessel under a decree of a court of the United States (Tr. p. 73). If by this is meant that there is no law of Norway which in express terms forbids the transfer of a Norwegian vessel *under a decree of a court of the United States,* we have no doubt the affidavit is true; it would be most remarkable indeed if such a statute existed. But, if the affidavit means anything more than this, it was conclusively shown not to be correct. There was introduced in evidence (Tr.

p. 76) a collection of Norwegian laws published for the use of Legations and Consulates wherein appear the Norwegian statutes with relation to shipping. These statutes prescribe that Norwegian vessels must be owned by Norwegian subjects, and may not be transferred to any one who is not a Norwegian subject without special permission had from the government, and that any transfer in contravention of this prohibition will subject the parties to it to fine and imprisonment and the vessel to forfeiture. A transfer to the plaintiff of the vessel which is the subject of the present controversy would be just such a transfer as the Norwegian statute prohibits and was manifestly designed to prevent, and this is true whether the transfer be made pursuant to a decree of a foreign court or not.

The Norwegian statutes upon which we rely are printed later in this brief.

In addition to the foregoing matters, there is a further fact or situation which should be stated as going most strongly to the proper exercise by the court of its discretion in appointing a receiver. The fact or situation is that not only is there no averment that the defendants are not able to respond fully and completely to any judgment against them, even though such judgment should be for the full value of the vessel plus her earnings, but it is positively and affirmatively averred on behalf of the defendants, and not denied, that, on the one hand, the plaintiff is financially irresponsible and wholly unable to respond to any judgment against it (Tr. pp. 50, 51), and on the other hand, that the real defendant, the Norsk Hydro, is a corporation of ample

means, not financially embarrassed in any way, with assets exceeding its liabilities far in excess of the value of the steamer, and amply able to respond to any judgment which the plaintiff might obtain (Tr. p. 57).

Argument.

As a preliminary to the discussion of the particular points involved, we would state certain fundamental rules governing the appointment of receivers *pendente lite*. We state them, not for purposes of discussion, for they are not open to discussion, but because they are the foundations upon which our argument proceeds. They are each supported by a host of authorities, but they are so thoroughly established and so familiar that we do not deem it necessary to do more in general than to cite some treatise where the rule is stated and where the authorities supporting it may be found if reference to such authorities is desired.

These rules are:

(1) The remedy of a receiver *pendente lite* is the most drastic provisional remedy which a court of equity may give. It is more drastic than the remedy of an injunction *pendente lite* which but stays action by the defendant for the purpose of preserving the *statu quo,* since the appointment of a receiver disturbs and changes the *statu quo* and takes from the defendant prior to a determination of the merits, and merely upon a claim of the plaintiff as yet unestablished, something which the defendant has, to-wit: the possession of the prop-

erty in controversy. The result is that the courts are, or at least should be, extremely loathe to appoint a receiver before judgment, and will not do so except in cases of the clearest sort.

High on Receivers, Sections 3 and 15;

Foster on Federal Practice, 6th Edition, Section 303;

34 Cyc. 21.

(2) The courts are particularly loathe to disturb the possession of a defendant having the legal title to the property, and, by reason of that fact, presumptively rightfully in possession.

Folk v. United States, 233 Fed. 177;

High on Receivers, Section 19;

34 Cyc. 48.

(3) The third rule we may state in the language of the syllabus of *Folk v. United States,* 233 Fed. 177, a syllabus prepared by the court. It is:

> "In order to bring a case within the exceptions to this general rule (that the court will not appoint a receiver of property in the possession of a defendant having the legal title) there must be clear proof (1) that there is imminent danger that unless a receiver is appointed the property or its proceeds will be materially deteriorated in value or wasted; (2) that the plaintiff will suffer irreparable loss from such deterioration or waste, and he can rarely suffer such loss when the defendants are solvent and abundantly able to respond to any damage they cause, or where they will give a good bond of indemnity against it; (3) that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover."

See also

High on Receivers, Section 11;
34 Cyc. 35 and 46.

There are also authorities holding, or at least stating, that where it appears that the defendant's possession was obtained by fraud, a receiver may be appointed.

High on Receivers, Section 11;
23 Ruling Case Law, p. 29 (Section 25).

This rule manifestly proceeds upon the theory that the defendant having obtained possession tortiously, should not be permitted to have the advantage of that possession during the litigation, and that to deprive him of it is not so much to disturb the *statu quo* as to restore that status which has been tortiously disturbed by the defendant. It is, of course, a rule which has no application when the defendant's possession was not itself, as distinguished from the defendant's claim of title, tortiously obtained. It is also a rule which manifestly applies particularly, if not exclusively, to cases where the defendant obtained possession only during the litigation or very shortly before its commencement. It is not a rule which can well apply where the defendant has been in possession for any considerable period of time.

In addition to the foregoing, there are two further rules, secondary in nature, but equally familiar. These are:

(4) Where the equities of the plaintiff's bill are fully and fairly met by the defendant, either by denials or by affirmative averments, a receiver should not be

appointed unless such denials or averments are overcome by a showing by the plaintiff that they are false.

High on Receivers, Section 24;

34 Cyc. 133.

This rule is, of course, but a corollary of the rule that a receiver will not be appointed unless, in the language of *Folk v. United States,* it appear

> "that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover."

(5) Where matters are averred by the plaintiff upon information and belief only, and are denied directly and positively by the defendant, the denials of the defendant must be taken to be true.

34 Cyc. 134.

We pass now to a discussion in the light of the foregoing rules of the particular propositions involved in the present case. They are these:

1. The ground and the sole ground upon which the appointment of a receiver was asked was conclusively shown not to exist.

2. The defendants were bona fide purchasers of the vessel for value and without notice.

3. The plaintiff is not entitled to recover in any case without repaying or offering to repay the $290,000 which C. Henry Smith advanced from his own funds for the alleged purchase of the vessel, and such payment the plaintiff has not made or offered to make.

4. The trust which the plaintiff is seeking to enforce is one illegal under the Norwegian law to which the

vessel is subject, and the transfer which the plaintiff seeks to compel is prohibited by that law.

The last three propositions have for their basis, of course, the rule that in order to justify the appointment of a receiver it must appear that "there is a strong probability that the plaintiff will ultimately recover."

This does not appear if any one of these three propositions is correct.

I.

THE GROUND AND THE SOLE GROUND UPON WHICH THE APPOINTMENT OF A RECEIVER WAS ASKED WAS CONCLUSIVELY SHOWN NOT TO EXIST.

As we have already stated, the only ground on which a receiver was asked is that just before the commencement of the action the plaintiff was dispossessed of the vessel by the defendants through the action of the captain, who, it is alleged, had been theretofore reporting to the plaintiff and taking orders from it, in refusing longer to do so and reporting to the defendants and taking orders from them. The averment of the petition for the appointment of the receiver is that up to July 15, 1921, or just four days before the commencement of the action, the captain had been so reporting to the plaintiff and taking orders from it.

Preliminary to a discussion of the truth of this averment, it should be observed that there is no allegation whatever of any fraud, violence or other tort whereby the plaintiff was deprived of possession. There is nothing but the bare allegation that on the day specified

the plaintiff was in effect deprived of possession by the refusal of the captain longer to report to and take orders from it. It would seem to be an essential element of any sufficient showing for the appointment of a receiver on the ground that the plaintiff has been deprived of the possession of the property that the plaintiff should have been so deprived tortiously. So far as we are aware, the rule has always been stated to be that the *fraudulent* deprival of the plaintiff of possession was a ground for the appointment of a receiver. It is possible that the rule might be extended to cases where the plaintiff was deprived of possession by some other tort than fraud, as, for instance, by threat or actual violence, but that there should be a tort in the acquisition of possession by the defendant would seem to be essential because of the reason upon which the rule proceeds. That reason, as we have stated, is that the defendant, having obtained possession tortiously, should not be permitted to have the advantage of that possession during the litigation, and that to deprive him of it *pendente lite* is not so much to disturb the *statu quo* as to restore that status which has been tortiously disturbed by the defendant. It is a reason which has no application whatever where the possession of the defendant has not been tortiously obtained. If this be true, then the petition in this case for the appointment of a receiver fails on its face to state any valid ground for such appointment.

But whether or not it was necessary for the plaintiff to show that it was tortiously deprived of possession, it was conclusively shown that the plaintiff had not been

deprived of possession, had not, in fact, had possession, and that the averment of the plaintiff's petition in that respect is untrue. The fact of the matter is that the vessel came into the port of San Francisco on May 24, 1921, and seven days later, that is, on May 31, 1921, the plaintiff itself brought a libel against the vessel for her possession and restitution (Tr. pp. 45-47), alleging that it was the lawful owner of the vessel and that possession of her was wrongfully withheld by the captain and C. Henry Smith (Tr. p. 46). This libel was still pending and the plaintiff had not obtained possession when the present action was commenced (Tr. p. 43). How the making of the averment of the plaintiff's petition in this case, that it was in possession of the vessel up to July 15th, can be justified in view of the fact that on May 31st it had brought an action for the purpose of recovering possession, we are wholly unable to see. We are unable to take any view of the averment in the petition other than that it was a reckless statement of that which clearly appears not to be the fact.

In addition to the fact that at the very time when the plaintiff alleges that it was in possession of the vessel it was in fact endeavoring to obtain possession by legal proceedings and had been so endeavoring for a considerable time before, there is the uncontroverted affidavit of the captain (Tr. pp. 49-50) to the effect that he became the captain of the vessel on November 3, 1920, immediately after her transfer from the Japanese to the Norwegian flag, and had been her captain and in the immediate exclusive possession of her ever since;

that he was instructed at the time to follow the orders of C. Henry Smith and had done so until the transfer of the vessel to the defendant Eriksen, after which he followed Eriksen's orders; that he had not at any time received any orders from the plaintiff, and that he had never even heard of the plaintiff until the vessel was libeled by it on May 31st. There is also the affidavit of C. Henry Smith (Tr. pp. 50-56), detailing his purchase of the vessel from her former Japanese owners and his furnishing from his own funds of $290,000 of her purchase price, and averring (Tr. pp. 52-53) that he had caused the vessel's captain to be appointed, that the captain had reported exclusively to him and to her registered owner, Mathiesen, until she was transferred to Eriksen, and that the plaintiff never had possession of her and never gave instructions or orders with regard to her.

The only contention that the plaintiff ever had possession which can be made with any possibility of justification is that C. Henry Smith was acting for the plaintiff and that because he was so acting the plaintiff had, through him, constructive possession of the vessel. But even such constructive possession must have ended prior to the bringing of the libel mentioned, and furthermore it was but a constructive possession, of which the captain and the defendants were ignorant. The loss of such constructive possession, unless lost through fraud, is certainly not the sort of loss of possesion which will jutify the appointment of a receiver.

The plain fact of the case is that it was Smith, who through the captain had possession and control of the

steamer, that he was recognized as her real owner, both by the captain and her registered owner, Mathiesen (Tr. p. 77), that he sold, or rather hypothecated, the vessel to the defendant Norsk Hydro, and caused her legal ownership to be transferred to Eriksen, and that following such transfer of ownership, and as an incident of it, possession was given the defendants through the captain's recognizing them as owners. The case, in other words, is simply one where the defendants acquired the legal title to the vessel, and acquired possession at the same time as an incident of such ownership. A possession so acquired is certainly not tortiously acquired, and there does not lie either in the fact that the defendants had possession or in their method of acquiring it any reason why such possession should be disturbed *pendente lite* and before it is finally determined that the plaintiff has the superior right to the property. On the contrary, every reason exists why the courts should be extremely loath to disturb a possession so honestly, even if possibly mistakenly, acquired, until it is certain that the defendants are not the true owners.

We submit, therefore, that the ground upon which a receiver was asked for, namely, that the plaintiff had been in possession until just before the commencement of the action and had then been deprived of it by the defendants, was conclusively shown to be untrue, and that for this reason alone the plaintiff's petition should not have been granted.

We take the liberty of repeating again that the sole ground upon which a receiver was asked for is that

just discussed. It is true, as we have said, that it is averred, and for that matter admitted, that the defendants would operate the vessel, and, as an incident of such operation, would send her to sea. If this were done, she would, of course, be exposed to loss through perils of the sea. But that this is not a justification of the appointment in this case, and was not advanced as a ground for the appointment, appears clearly from the fact that a receiver was asked for and appointed for the very purpose of operating the vessel and necessarily exposing her to those same perils. The petition for the appointment of the receiver makes it very plain that it was not the operation and sending to sea of the vessel that was objected to, but it was her operation by the defendants.

As to the fact that sending the vessel to sea involved removing her without the territorial limits of the court's jurisdiction, a complete answer is that it is not averred or claimed that such removal would destroy or affect the jurisdiction of the court or in any manner whatever render inefficacious a final judgment against the defendants if one be made. On the contrary, it affirmatively appears that the defendants have submitted to the jurisdiction of the court and are amply able to respond to any judgment against them, and we have the remarkable spectacle of an insolvent and irresponsible plaintiff asking for and obtaining the appointment of a receiver against a solvent and responsible defendant, who has both possession and the legal title, and who acquired the possession contemporaneously with and as an incident of acquiring the legal title.

Nor is there room for the contention that if the ship were not within reach of the process of the court, a judgment against the defendants might be difficult or impossible of enforcement because of the fact that the defendants are not citizens of this country, but of Norway. A complete answer is that it is nowhere averred and it does not appear that the defendants have not, within reach of the process of the court, property amply sufficient to satisfy any judgment that might be rendered against them.

II.

THE DEFENDANTS WERE BONA FIDE PURCHASERS OF THE VESSEL FOR VALUE AND WITHOUT NOTICE.

We think it hardly admits of controversy that upon the pleadings and proof in this case it must be taken that the defendants are bona fide holders of the legal title for value and without notice, unless the fact that they knew when they acquired the vessel that Mathiesen held her registered ownership in trust was constructive notice to them of the plaintiff's claim. The burden rested upon the plaintiff to show that the defendants were not bona fide purchasers for value and without notice. The plaintiff's averments that the defendants were not such purchasers are upon information and belief only and are flatly and positively denied. In addition to this, the transaction whereby the defendants acquired the vessel is detailed, and it appears clearly that a valuable consideration was given and that the transaction was one which the defendants would hardly

have entered upon and consummated if they had had the slightest suspicion that any one but Smith had a beneficial interest in the vessel. Smith was already heavily in their debt, and they were hardly likely to allow him to get further in their debt to the extent of $90,000 if they had any notion that anyone else might claim a superior right in the vessel. As we have said before, the only answer, as we remember it, that was made by the plaintiff's counsel in the lower court to the contention that upon the pleadings and proof it must be taken that the defendants were bona fide purchasers for value and without notice, is that they had constructive notice for the reason stated. The sole question, then, is as to such constructive notice.

We think it likewise hardly admits of question that where two persons act in conjunction in disposing of property, one in the capacity of the holder of the legal title and the other in the capacity of the beneficial owner, they jointly represent that one holds the legal title for the other and that between them they hold the full legal and beneficial ownership. Their assuming to dispose of the property in those capacities is the strongest possible method of making such a representation. Such are the facts in this case. Smith offered the vessel to the defendants as his own, and offered to have her transferred to them by her registered owner. Her registered owner recognized Smith's right to do this and delivered the bill of sale in accordance with his instructions. The two assumed together to dispose of the vessel, the one as trustee holding the registered ownership, and the other as the beneficiary for whom such

ownership was held. The defendants purchased from them, believing them to be such trustee and beneficiary, respectively, and to have between them the full legal and beneficial ownership. The question then is, are the defendants nevertheless to be charged with constructive notice that Smith was not the true beneficiary for whom the registered title was held, simply because of the fact that the defendants knew there was a trust? When the fundamental principles governing the matter of constructive notice are stated, the answer to the question is plain. In the language of

Wilson v. Wall, 6 Wall. 83, 18 L. Ed. 727,

> "A chancellor will not be astute to charge a constructive trust upon one who has acted honestly, and paid a full and fair consideration without notice."

It is therefore not sufficient in order to charge a purchaser for value with constructive notice that it be shown merely that if he had followed up every source of inquiry open to him he either might, or certainly would, have acquired knowledge of the latent equity. It must appear either that he has fraudulently turned away from making an inquiry, or at least that the facts were such that he was culpably and grossly negligent in not making inquiry. In

Jones v. Smith, 1 Hare 43, 66 Eng. Rep. R. 943,

the vice-chancellor states the rule thus:

> "If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts which the *res gestae* would suggest to a prudent mind; if

mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,—there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser without notice."

In

Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 43 Eng Rep. R. 586,

the lord chancellor said:

"Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it, but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

It is also elementary and familiar that if there are circumstances which would properly put a person upon inquiry, yet such circumstances are only constructive notice of matters which they themselves suggest and are not constructive notice of matters which they do not suggest. A frequently quoted expression of the rule is found in the old case of

Birdsall v. Russell, 29 N. Y. 220.

It is there said:

> "The rights of the purchaser are not to be affected by constructive notice unless it clearly appear that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing but hidden at the time. There must appear to be in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter."

See also

39 Cyc. 1703.

Now, in the present case, when it appeared to the defendants that Mathiesen held the legal title to the vessel in trust, and it was also represented to them that he held it in trust for Smith, and Mathiesen himself confirmed this representation by recognizing Smith and following his instructions, where was there anything which should properly have alarmed the defendants or caused them to suspect that someone other than Smith was the true beneficiary? When the holder of the legal title recognized Smith as the owner subject to whose orders he held the title, what more was there to it? Was not the holder of the legal title the one who should know for whom he held it if he did not hold it for himself? And if he says to the defendants, as in effect he did, that he holds it for Smith, what is there to suggest that he holds it in truth for somebody else, or what is there to cause the defendants to suspect that he so holds it, or to make them guilty of fraud or culpable negligence in not seeking further in-

formation? If I go to the holder of the legal title to real property or to a ship, and he informs me that he holds the property for Smith, surely I am justified in dealing with him and Smith as together the full owners of the property unless there comes in something else indicating that the information given me is not true. The mere fact that the legal title is held in trust does not so indicate. The inquiry as to whom the property is held in trust for is already answered and answered by the one person who should know, namely, the holder of the legal title. There must be some further circumstance indicating to me that the information given me is false or I cannot be charged with constructive notice that it is false. No such circumstance appears here.

Putting the matter in a slightly different way, the information which the defendants had and upon which they acted was that the vessel was held in trust for Smith. Surely information that the property was held upon one trust, a trust for Smith, was not constructive notice that it was held upon another trust, a trust for the plaintiff. Information as to one trust or latent equity certainly does not suggest another, or give any reason to suspect another.

A case very closely parallel to the present is that of

The City of Trinidad v. Milwaukee etc. Co., 63 Fed. 883 (C. C. A. 8th Cir.).

There a citizens' committee of the City of Trinidad agreed to furnish a site for the plant of a smelting company if the latter would locate its plant in the city. The smelting company agreed to this and the committee

purchased the site fixed upon and took a deed to it in the name of one of them, Wight, "as trustee". The company erected its smelter on the land and the trustee then conveyed the land to the company. It subsequently appeared that the money used by the citizens' committee to purchase the land was misappropriated from the city's funds and the city brought an action to enforce a lien upon the property for the recovery back of its funds which had been used in making the purchase. The smelting company had taken the deed from the trustee in ignorance of the misappropriation, but it was contended that it was nevertheless charged with constructive notice of the city's rights because it knew that it was taking the land from a trustee and it behooved it to ascertain who was the real beneficiary of the trust. The court, however, held that there was no constructive notice, that the smelting company was justified in acting upon the assumption that the trust was one for the citizens' committee, and that the facts known in regard to the trust furnished no clue or suggestion as to the city's equitable right. Among other things, the court said:

> "When it is sought to bind a party by constructive notice 'there must appear to be in the nature of things such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter'. *Birdsall v. Russell,* 29 N. Y. 220, 250. In this case there was not the remotest connection between what the smelting company actually knew or had any reason to suspect and the claim now set up by the city."

See also, as very similar cases:

Mercantile Bank v. Parsons, 54 Minn. 56; 55 N. W. 825; 40 Am. St. Rep. 299;

O'Neal v. Boone, 82 Ill. 589.

The argument of plaintiff's counsel in the court below was that the case was the same as, or at least analogous to, one wherein a person purchases from a trustee or agent with limited authority, and that the rule in such a case is that the purchaser must inform himself as to just what the authority of the trustee or agent is. But the present case is not that, nor is it analogous to it. There is no dealing here with a trustee or agent with limited authority. The dealing here was with both the trustee and the supposed beneficial owner recognized by the trustee as such, so that the full ownership, both legal and beneficial, was apparently present and consequently there was also apparently present full authority to deal with the property in any manner.

Following further along this line, it will not be contended that a purchaser may not assume, in the absence of anything indicating the contrary, that the holder of the legal title is likewise the beneficial owner and may not safely deal with him as such. If a purchaser may do this, may he not also assume, when he is in effect informed by the holder of the legal title that the latter holds it for Smith, that the holder of the legal title and Smith represent together the full legal and beneficial ownership of the property, and may he not safely deal with them as such? What difference is there between dealing with a single man who holds the legal title and

represents himself to be the beneficial owner as well, and dealing with two men, one of whom holds the legal title and the other of whom is represented by the holder of the legal title to be the beneficial owner? Is not the full apparent ownership, both legal and beneficial, present in both instances, and is not the equity of a third person chargeable upon the legal title just as much a latent equity in one case as in the other?

We submit, therefore, that the defendants in this case are not to be charged with constructive notice of the right claimed by the plaintiff, and that upon the pleadings and the proof they must be taken to be bona fide purchasers for value of the legal title, accompanied by the full beneficial interest, and without notice. As such purchasers, they have a complete defense to the plaintiff's claim.

We would add one thing more in order to avoid any misapprehension. We have constantly referred to the defendants as purchasers. They, of course, did not purchase the vessel outright. What they did was to take title to her as security for the indebtedness due them, and in one sense, therefore, they were not purchasers, but rather mortgagees, holding the legal title. But as such mortgagees they are entitled to protection to the extent of their debt in the same manner as if they had been outright purchasers. In the sense in which the word "purchaser" is used in the statement of the equitable rule that bona fide purchasers for value and without notice take free of latent equities, the defendants are purchasers, and it is in that sense that we have used the word.

III.

THE PLAINTIFF IS NOT ENTITLED TO RECOVER WITHOUT REPAYING OR OFFERING TO REPAY THE $290,000 WHICH C. HENRY SMITH ADVANCED FROM HIS OWN FUNDS FOR THE ORIGINAL PURCHASE OF THE VESSEL, AND THIS PLAINTIFF HAS NOT DONE.

The facts in connection with this defense have already been stated and need not be repeated in any detail. They are that upon the original purchase which the plaintiff claims was made by C. Henry Smith for it, and under which alone the plaintiff's right exists, if it has any right, the full purchase price of $350,000 was advanced by Smith from his own funds, that later, through the plaintiff, there was paid him $60,000 on account, and that with this exception he has not been reimbursed for the money so advanced, and there has been no offer to reimburse him. These facts are not controverted and they are facts necessarily within plaintiff's knowledge and easily capable of being disproven if untrue. They must be taken to be the facts in the case. The questions presented by their existence are, of course, purely questions of law.

That the defendants at least stand in the shoes of Smith and that the plaintiff cannot recover against them if it could recover against Smith is not open to argument. We may discuss this branch of the case, then, as if the action were one against Smith. So discussing it, and assuming the truth of plaintiff's claim that Smith purchased the vessel for it, the question may be stated thus:

Smith purchased the vessel for the account of the plaintiff, but did so with funds advanced by himself and for which he has not been reimbursed, in the amount of $290,000. Could the plaintiff in this situation recover the vessel from Smith without paying or offering to pay him the $290,000?

Neither the situation nor the question presented is a novel one. The case is simply one where A purchases certain property for B, advancing all or a portion of the purchase price himself. In such a case the courts without exception, so far as we are aware, hold that since A made the purchase for B, A takes the property upon a resulting trust for B, but B may not take the property and avail himself of the benefit of the purchase and of the money which A advanced in making it, without repaying A. The requirement that B reimburse A if he wishes to avail himself of the property purchased with A's funds proceeds upon the plainest principles of equity and justice, and the requirement that B do so is but a very simple illustration of the equitable maxim that he who seeks equity must do equity.

The rule is thus stated in

Campbell v. Freeman, 99 Cal. 546:

> "The rule is familiar that when, upon a purchase of real property, the purchase money is paid by one person and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee and to demand a conveyance from him at any time. The same rule prevails if

the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser, he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. The conveyance is none the less a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed, with which to make the purchase. He is regarded as holding the land in trust for the protection of the purchaser, but this rule is not to be so extended as to enable the purchaser to work him an injury."

The following cases lay down the same rule:

Hidden v. Jordan, 21 Cal. 92;

Milliard v. Hathaway, 27 Cal. 119;

Walton v. Karnes, 67 Cal. 255;

Ward v. Matthews, 73 Cal. 13.

See also

15 Amer. & Eng. Ency. of Law 1147, and cases there cited.

So plain is the justice of the rule, and so strongly is it insisted upon, that not only is it applied where

the trust is a resulting one arising from a purchase by A for B pursuant to an understanding between them, but it is applied where the trust is a constructive one based upon fraud or other wrong upon A's part. In other words, even if A has been guilty of fraud or wrong by reason of which a trust is imposed upon him, yet he will still be protected to the extent to which his money is in the trust property.

Rothwell v. Dewees, 2 Black (U. S.) 613 (17 L. Ed. 309);

Haswell v. Standring, 152 Iowa 291; 132 N. W. 417;

Patterson v. DeLong, 11 Colo. A. 103; 52 Pac. 687.

In *Rothwell v. Dewees,* just cited, for example, an agent, whose duty it was to pay the taxes on his principal's property, permitted the property to be sold for taxes and himself bought it in at the tax sale. The court held that he held the property in trust for his principal, but that the latter could not recover it except upon reimbursing the agent for what he had paid on account of the property.

The rule is so familiar and so well established, and the simple justice of it is so plain, that we do not care to take the attention of the court by further discussion of it.

The only reply in the lower court, as we remember, to the proposition that the plaintiff could not recover even against Smith, and if not against him, certainly not against the defendants, without the repayment of the $290,000 for which Smith had not been reimbursed, and

that because the plaintiff had not paid or offered to pay this sum it had no cause of action and was not entitled to the appointment of a receiver, was made by the court itself. It was that the rights of Smith and of the defendants, his assignees, could be protected by the final decree which could be so moulded as to require payment by the plaintiff as a condition of recovering the vessel.

A very brief consideration of this reply will disclose its fallacy. It means, in this case for example, that although there may be in reality nothing to be accomplished by the litigation since the plaintiff may be wholly unwilling to pay $290,000 as a condition to the recovery of the vessel and will not comply with the final decree, if it so provides, but will allow the defendants to keep the vessel, it may yet go on and litigate to a fruitless decree, and, in the meantime, have the defendants deprived of their possession by the appointment of a receiver. If the plaintiff must pay $290,000 as a condition of recovering the vessel, certainly as a condition of maintaining its action it should make a tender of compliance with that condition. Why should the time and attention of the courts be engaged and the opposing parties harassed unless the plaintiff offers compliance with the condition which it must comply with before it can have the relief it seeks? The vessel in this case cost, in the fall of 1920, $350,000. It is a matter of common knowledge that the value of shipping fluctuates sharply and has fallen since the fall of 1920 50% or more. To permit the plaintiff now to wait until the final decree without offering to pay the $290,000

is simply to permit it by this litigation to speculate upon the value of the vessel—to take the vessel if at the time of the final decree it is worth $290,000 or more, and not to take it if it is not.

The reason advanced by the lower court, furthermore, wholly fails to take into consideration the position of the defendants. It may well be that if the plaintiff had offered the $290,000, the offer would have been accepted and there would have been no litigation. It is certainly not right that the defendants, entitled to hold the vessel until the $290,000 is paid, should be harassed with litigation unless that amount has been tendered them. Can it be said that they are in default or that there is any cause of action against them until such amount is tendered them and refused? How, then, can the plaintiff maintain this action against them without such tender? Our position upon this point is supported by the authorities. In an exactly similar case to the present, the court said in

> *Hoffman v. Buchanan*, 123 S. W. 168 (57 Tex. Civ. A. 368):
>
> "Assuming that, under the testimony, the court should have concluded that the agreement between the parties created a direct and express trust by which Buchanan acquired and held the title for Hoffman, the testimony showed that Buchanan paid for the land with his own means. *From this it follows that Hoffman was not entitled to the conveyance sought, except upon a repayment of the purchase price thus advanced.* The court found, upon conflicting evidence, that Hoffman never paid or tendered payment of that sum. This conclusion must be regarded as a finding that no offer tantamount to a tender had ever been made by Hoffman.

> While appellant controverts the correctness of this finding, it is conceded that no payment has in fact ever been made by Hoffman. Admitting the existence of the trust relation insisted upon by counsel, still the appellant is not entitled to recover upon his own showing. In his pleading he nowhere offers to make payment, or avers a willingness or ability to do so. *Had he pleaded the facts proved as to the title upon which he relied for recovery, he would not have stated a cause of action without also offering to do equity by alleging a willingness and ability to pay the purchase price as a condition of a judgment in his favor.*" (Italics ours.)

The exact situation presented here was presented in *Uehling v. Lyon,* 134 Fed. 703.

There the plaintiff's bill was dismissed because he had not offered to pay the amount to which the alleged trustee was entitled before the latter should be deprived of the trust property.

The case is accurately stated in the syllabus, thus:

> "Where defendant held stock in trust for M, which was subject to defendant's equitable claim for services, rendered in executing the trust, and complainant's only claim to certain of such stock was through M, complainant could not maintain a bill to compel defendant to transfer the stock to him without offering to satisfy defendant's claim thereon."

The reasons why a plaintiff should not be permitted to maintain an action to have property transferred to him as property held by the defendant as trustee for him unless he tenders payment of all advances due to the trustee, have double force where such a plaintiff asks for the appointment of a receiver *pendente lite.* The plaintiff is not entitled to possession of the property until

he pays the defendant the amount the latter has advanced upon it, and the defendant is entitled to such possession until the plaintiff does so pay or offer to pay. Surely in such a situation the plaintiff may not deprive the defendant of possession by securing the appointment of a receiver *pendente lite* when he has not paid or offered to pay the amount of the defendants' equitable lien.

We submit, therefore, that it must be taken upon the pleadings and proof that the plaintiff in this case cannot recover the vessel from the defendants except upon the payment of $290,000, and that because the plaintiff has made no tender of this payment and has not even averred its willingness to pay, it cannot recover in the present action and, above all, it cannot deprive the defendants of their possession by the appointment of a receiver *pendente lite*. If the plaintiff desires provisional relief of a nature so drastic as the appointment of a receiver, certainly it ought at least to offer compliance with the condition which it must comply with before it can have the final relief it seeks.

IV.

THE TRUST WHICH THE PLAINTIFF IS SEEKING TO ENFORCE IS ONE ILLEGAL UNDER THE NORWEGIAN LAW TO WHICH THE VESSEL IS SUBJECT, AND THE TRANSFER WHICH THE PLAINTIFF SEEKS TO COMPEL IS PROHIBITED BY THAT LAW.

The Norwegian statute of July 21, 1916, as amended July 13, 1917, reads:

"Section 1. A ship, or a share in a ship, entered in the Register of Norwegian Ships, or for which a provisional Certificate of Nationality has been issued, must not be transferred, in any form whatever, to any person who cannot be the owner of a Norwegian ship under Section 1 of the Maritime Law of July 20, 1893. Nor shall it be permissible to transfer any share in a company owning such a ship to any person who cannot be the owner of a Norwegian ship, provided that by such transfer the ship would cease to be a Norwegian ship.

"Section 2. In special cases the Government Department concerned may grant dispensation from the prohibition provided by Sec. 1.

"Section 3. The transfer of a ship, or share in a ship, in contravention with Section 1, must not be registered, and the ship must not be struck off the Register unless the dispensation referred to in Section 2 has been granted. Nor may a ship belonging to a company be struck off the Register owing to the transfer of a share in the company contrary to the prohibition laid down in Section 1.

"Section 4. Any transgression of the prohibition referred to in Section 1 shall be liable to a fine or imprisonment for a period not exceeding 6 months, while the ship or share sought to be sold in contravention with the prohibition will be subject to forfeiture to the State Treasury. If this be not practicable, the value of the ship or share shall be claimed from the offender.

"Section 5. The present law shall come into force without delay."

The meaning of this statute is plain. It prohibits the transfer of a vessel "in any form whatever" to any person who cannot be the owner of a Norwegian ship under Section 1 of the Maritime Law of July 20, 1893. Section 1 of the Maritime Law of July 20, 1893, as likewise amended July 13, 1917, reads:

"A ship is a Norwegian ship when owned exclusively by Norwegian State-Citizens.

"A ship belonging to a Joint Stock Company is a Norwegian ship, when the Head Office of the Company and the seat of its Directors are in this Kingdom and the Directors are Norwegian state-citizens domiciled in this country and shareholders in the ship, and when the value of shares held by Norwegian state-citizens amounts to at least six-tenths of the share capital. Without the consent of the directors no persons other than a Norwegian state-citizen can become shareholders in a company to which a Norwegian ship belongs. The Directors of such a company shall every year in the month of January forward to the Ministry concerned a list showing the name, profession, address and nationality of every shareholder in the company at the end of the preceding year, and the number of shares held by them respectively.

"The provisions contained in the second clause shall apply in like manner to ships belonging to Commandite Companies of Shareholders so that the rules prescribed respecting the Directors and the share capital shall, in respect of Commandite Companies of shareholders, apply to the commandite-shareholders and to the commandite capital.

"In the operation of this paragraph the State Institutions and Funds administered by the State, Norwegian Municipalities and Parishes, Norwegian Savings Banks as well as Corporations and Foundations of public utility having a Norwegian Management whose seat is in Norway shall be deemed equal to Norwegian subjects."

The meaning of this statute also is plain. It is: (1) that a Norwegian vessel must be owned by a Norwegian subject, and (2) that when the Norwegian subject is a Norwegian corporation, at least six-tenths of its stock must be owned by Norwegian citizens.

Such being the Norwegian law, two things are evident: First, assuming that the original purchase of the vessel from the Japanese was for the account of the plaintiff, the arrangement upon which she was purchased, namely, that she was to be given a Norwegian registry in the name of a Norwegian subject, but with the plaintiff, an American corporation, as the real owner (Tr. pp. 58, 59), was an arrangement in evasion of the Norwegian law and made for the purpose of obtaining for the benefit of the plaintiff the privileges and advantages of a Norwegian registry when the plaintiff was not entitled to them. Second, a transfer now of the vessel by the defendants to the plaintiff is positively prohibited by the Norwegian statute, and if made by the defendants would subject them to fine and imprisonment and the vessel to forfeiture under the Norwegian law.

Our own statutes at present are practically the same with reference to American vessels as the Norwegian statutes with reference to Norwegian vessels. They provide that no vessel is entitled to the privileges and advantages of an American registry unless American owned, and that an American vessel may not be sold or transferred from under our flag without governmental permission. If the character of the vessel and the nationality of the parties in this case were reversed, and there was presented to this court the claim of a Norwegian corporation seeking to enforce against American citizens a claim to an American vessel, it hardly admits of question that the plaintiff could not obtain relief in the face of our statutes.

In the first place, the very trust upon which the plaintiff relies in such a case would be illegal because entered into by the original parties to it, of whom the plaintiff was one, for the purpose of evading our statutes and giving to the plaintiff, a Norwegian subject, the advantage of owning and operating a vessel under an American registry. Just such trusts have come before our courts and before the English courts under similar English statutes and have been held illegal and therefore unenforceable.

Lewin on Trusts, Section 166,

makes the following statement as to the English law:

> "The court cannot imply a resulting trust in evasion of an act of parliament, and therefore [under the old Registry Acts] if A on purchasing a ship, took the transfer in the name of B, the complete ownership, both legal and equitable, was in B. In order to enforce the navigation laws and to secure to British subjects the exclusive enjoyment of British privileges, the Registry Acts required an exact history to be kept of every ship, how far throughout her existence she had been British built and British owned, and if implied trusts were permitted the whole intent of the legislature might have been indirectly defeated."

See also

Ex parte Yallop, 15 Vesey 60; 33 Eng. Rep. R. 677;

Ex parte Houghton, 17 Vesey 251; 34 Eng. Rep. R. 97.

In

Ogden v. Murray, 39 N. Y. 202,

at page 206, it is said:

"The question thereupon arises, may a foreign corporation, in order to obtain and keep all the advantages derivable from a trade which can only be advantageously carried on in American vessels, registered as such, under a system which makes a fraudulent registry a forfeiture of the ship, and which requires the oath, that no foreigner has any interest in the ship,—purchase and employ ships for the sole use and benefit of the corporation, and with expressed authority to direct and control their use and disposition, and cover the ownership under a trust in American citizens, they taking the title for that purpose.

"I cannot resist the conclusion that this is not only an evasion, but a fraud upon the laws of the United States, which ought not to be sustained or sanctioned, directly or indirectly, and that no court should hold that a trust for such a purpose should be upheld either to give compensation to the trustees or for any other object."

A wholly analogous case was presented under the English statute forbidding the ownership of land by Catholics. It was held that because of this statute, if A, a Catholic, purchased land in the name of B, the courts would not enforce against B a trust in favor of A.

Redington v. Redington, 3 Ridge 184;
Lewin on Trusts, section 167.

Another analogous case is presented under our own homestead acts, which provide, in effect, that the public land may not be homesteaded for the benefit of another than the homesteader. A trust may therefore not be enforced against the homesteader.

Caroll v. Draughon, 56 So. 207; 173 Ala. 327;
Clark v. Bayley, 5 Oreg. 343;
Shorman v. Eakin, 1 S. W. 559; 47 Ark. 351.

In the second place, the very relief sought in such a case—that of the transfer of an American boat to a foreign citizen—is prohibited by our statute and is against the declared policy of our law. In other words, if the court should direct the defendants to do that which the plaintiff seeks to have them directed to do, the court directs a violation of the law. That the court will not do this when it is our law that is involved is not open to argument.

There can, then, be no reasonable question as to the proper action of our courts if the present case arose under our own laws. Will they take the same action when the case arises, as it actually does, under the laws of a foreign state? This is the final question in connection with the defense under discussion.

The courts of this country are, of course, not controlled by the laws of a foreign state, and they may disregard those laws, if they please, and recognize and enforce contracts, trusts and other arrangements for evading or violating them, and may even by decree compel their violation. But the plainest reasons of comity require that neither our courts nor the courts of any other nation that claims to be civilized and to desire to live on terms of amity with sister nations should do this. What, for instance, would our opinion be of the action of the courts of Norway if they endeavored to compel an American citizen to transfer an American vessel to a Norwegian citizen when our laws provide that no transfer of an American vessel to a foreigner may be made? Would we not consider it a gross failure to recognize the rule of comity which should prevail

among friendly civilized nations and be followed by their courts? Yet if we would so look at such a decree by a Norwegian court, if taken against one or more of our citizens with reference to an American vessel, must not our courts in turn take the same view when they are asked to compel citizens of Norway to make a transfer of a Norwegian vessel to an American when the laws of Norway expressly forbid such a transfer?

This rule of comity is thoroughly well recognized by the courts and so far is it carried that the courts hold illegal not only a contract involving directly a violation of the law of a foreign state, but a contract which is made merely for that ultimate purpose without itself involving any violation of the law of the jurisdiction where it is both made and is to be performed. Thus a contract made in Massachusetts for the sale of liquor there, with the object, however, on the part of the buyer, known to the seller, of importing the liquor into Maine in violation of the laws of the latter state, was held illegal by the courts of Massachusetts, although under the law of Massachusetts, where the contract was not only made but was to be performed, there was no objection to it.

Judge Holmes, speaking for the court, lays down the rule of comity thus (*Graves v. Johnson,* 156 Mass. 211; 30 N. E. 818; 15 L. R. A. 834):

> "Of course it would be possible for an independent state to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbors' laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition,

> it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Cont., 5th Ed. 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an action on the part of the seller in furtherance of the scheme. Waymel v. Reed, 5 T. R. 599; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Fisher v. Lord, 63 N. H. 514, 3 Atl. 297; Hull v. Ruggles, 56 N. Y. 424, 429."

We respectfully submit, therefore, that the original trust under which the plaintiff here claims was illegal as involving and contemplating a violation of the laws of Norway, and that in any case the courts of this country will not compel the transfer by Norwegian citizens of a Norwegian ship to one not a citizen of Norway, in the face of the Norwegian statute prohibiting any such transfer. Yet the ultimate relief sought by the plaintiff is just such a transfer and nothing else.

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Respectfully submitted,

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